STATE OF MICHIGAN

COURT OF APPEALS

BRUCE PIERSON and DAVID GAFFKA,

Plaintiffs/Counterdefendants-Appellants/Cross-Appellees,

v

ANDRE AHERN,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee/Cross-Appellant,

and

TOKIO OGIHARA and OGIHARA AMERICA CORPORATION,

Third-Party Defendants-Cross-Appellees.

UNPUBLISHED
July 19, 2005

No. 260661
Livingston Circuit Court
LC No. 04-020828-CZ

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right, and defendant cross appeals, from the trial court's order granting defendant summary disposition on plaintiffs' first amended complaint, and granting plaintiffs' motion for summary disposition of defendant's countercomplaint. We affirm.

Plaintiffs commenced this action for defamation after defendant allegedly sent a package of materials to third-party defendant Tokio Ogihara, president of third-party defendant Ogihara America, where plaintiffs and defendant were employed. The package consisted of a letter that allegedly disparaged plaintiff David Gaffka's work performance and photographs that allegedly showed examples of his poor workmanship. The return address label on the package listed plaintiff Bruce Pierson as the sender. The company investigated the incident, concluded that defendant was the actual sender of the package, and subsequently discharged him for violating

the company's code of conduct. Defendant filed a countercomplaint and a third-party complaint alleging claims for contribution,[1] abuse of process, conspiracy to abuse process, and discharge in violation of public policy. The trial court dismissed plaintiffs' first amended complaint pursuant to MCR 2.116(C)(8) (failure to state a claim), and dismissed defendant's countercomplaint and third-party complaint pursuant to MCR 2.116(C)(4) (lack of subject-matter jurisdiction).

Plaintiffs first argue that the trial court erred in dismissing their defamation claims under MCR 2.116(C)(8). A trial court's decision regarding summary disposition is reviewed de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A motion under MCR 2.116(C)(8) challenges the legal sufficiency of the claim based on the pleadings alone. *Id*.

To establish a defamation claim, a plaintiff must show (1) a false and defamatory statement about the plaintiff, (2) an unprivileged publication to another party, (3) fault amounting at a minimum to negligence on the publisher's part, and (4) either actionability of the statement regardless of special harm or the existence of special harm as a result of the publication. *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 8-9; 602 NW2d 233 (1999). The complained-of statements must be pleaded with specificity. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 53-54, 56-57; 495 NW2d 392 (1992). In their first amended complaint, plaintiffs alleged that defendant sent a package of allegedly defamatory materials consisting of a letter and photographs to Ogihara, but plaintiffs did not attach copies of the letter or photographs, or describe their substance in their complaint. We agree with the trial court that plaintiffs failed to plead a claim of defamation with sufficient specificity regarding the allegedly defamatory statements. *Id*. Summary disposition was proper under MCR 2.116(C)(8).[2]

Plaintiffs also argue that the trial court erred in denying their motion to amend their complaint. In its opinion, the trial court stated that even if it had allowed plaintiffs to file their proposed second amended complaint, it would have found that summary disposition was still proper because, with regard to plaintiffs' defamation claims, plaintiffs "failed to present sufficient evidence alleging a question of material fact of the defamatory nature of the letter and photographs." In essence, the trial court concluded that even if plaintiffs had filed their proposed second amended complaint, summary disposition was warranted under MCR 2.116(C)(10). Plaintiffs claim the court's decision was erroneous because it required plaintiffs to prove economic damages even though plaintiffs had pleaded defamation per se when they pleaded damage to their professional standing. We disagree.

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[1] This claim is not at issue on appeal.

[2] Although plaintiffs assert that the trial court improperly looked beyond the pleadings, the trial court's reference to matters outside the pleadings was made only in the context of the court's independent ruling that if it were to consider plaintiffs' proposed second amended complaint, those claims would not be sustained because there was no genuine issue of material fact regarding whether plaintiffs were injured. There is no indication in the trial court's opinion that the court considered any documents beyond the pleadings when granting summary disposition of plaintiffs' first amended complaint under MCR 2.116(C)(8) for failure to state a cause of action.

Defamation per se does not require proof of damages because injury is presumed. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 728; 613 NW2d 378 (2000). Citing *Glazer v Lamkin*, 201 Mich App 432, 438; 506 NW2d 570 (1993), plaintiffs argue that defamation with respect to professional standing is slander per se. The Court in *Glazer, supra* stated, "Slander (libel) per se exists where the words spoken (written) are false and malicious and are injurious to a person in that person's profession or employment." *Id.*, citing *Swenson-Davis v Martel*, 135 Mich App 632, 635; 354 NW2d 288 (1984). Injurious is defined as "1. harmful, hurtful, or detrimental, as in effect . . . 2. insulting; abusive; defamatory." *Random House Webster's Dictionary* (2001). The first definition indicates that there has to be a harmful effect; however, the second definition, which actually lists defamatory, does not necessarily indicate that there has to be a harmful result. The need to demonstrate a harmful result or effect does not appear to coincide with the per se concept of presumed injury.

Nevertheless, quoting MCL 600.2911(2)(a), the *Glazer* Panel also stated that a plaintiff "'is entitled to recover only the actual damages he or she has suffered.'" *Glazer. supra* at 436. The statute provides that a plaintiff may only recover for actual damages suffered "in respect to his or her property, business, trade, profession, occupation, or feelings." MCL 600.2911(2)(a). The statute separately indicates that words imputing lack of chastity or commission of a criminal offense "are actionable in themselves." MCL 600.2911(1). Because the statute allows recovery only for actual damages for defamation regarding one's profession; the statute lists per se actions separately under a different subsection; and this Court in *Glazer, supra* indicated actual damages must be proven, plaintiffs here were required to show actual damages, and the instant court appropriately found that plaintiffs failed to do so.

On cross appeal, defendant argues that the trial court erred in determining that his claims for abuse of process, conspiracy to abuse process, and discharge in violation of public policy, were preempted by the National Labor Relations Act (NLRA), 29 USC 151 *et seq*. We review de novo whether a court has subject-matter jurisdiction. *Calabrese v Tendercare of Michigan, Inc*, 262 Mich App 256, 259; 685 NW2d 313 (2004).

As this Court observed in *Calabrese*, *supra* at 260, under the United States Supreme Court's decision in *San Diego Building Trades Council v Garmon*, 346 US 485; 74 S Ct 161; 98 L Ed 228 (1959), a state claim is preempted when it concerns

> "an activity that is actually or arguably protected or prohibited by the NLRA. The state claim may survive, however, if the conduct at issue 'is of only peripheral concern to the federal law or touches interests so deeply rooted in local feeling and responsibility . . . .' The court balances the state's interest in regulating or promoting a remedy for the conduct against the intrusion in the NLRB's [National Labor Relations Board's] jurisdiction and the risk that the state's determination will be inconsistent with provisions of the NLRA. [Quoting *Bullock v Automobile Club of Michigan*, 432 Mich 472, 493; 444 NW2d 114 (1989) (footnotes omitted).]

If the controversy pertains to a matter identical to one that could be presented to the NLRB under the NLRA, state exercise of jurisdiction necessarily involves a risk of interference with the NLRB's jurisdiction and is precluded. *Calabrese, supra* at 261.

Section 157 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . ." 29 USC 157. Additionally, § 158 of the NLRA states, in pertinent part:

> (a) It shall be an unfair labor practice for an employer-
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter. [29 USC 158.]

Defendant's countercomplaint alleges that plaintiffs and third-party defendants conspired to abuse the judicial process by initiating this lawsuit for ulterior motives, namely, to retaliate against him for his union activity and for testimony he gave before the NLRB that was against his employer's interest, to intimidate him and others from engaging in union activities, and to discover the names of other union supporters in order to retaliate against them. Defendant further alleges that he was terminated because of his participation in unionizing activities. Looking at the gravamen of defendant's countercomplaint, the trial court correctly determined that defendant's claims fell within the purview of the NLRA by alleging unfair labor practices. The alleged actions by the third-party defendants are precisely the type of employer conduct that the NLRA seeks to prohibit under §§ 157 and 158 of the NLRA.

Defendant's argument that the trial court erred by not performing the balancing test set forth in *Calabrese, supra,* is without merit. The balancing test is utilized only when the claim is of peripheral concern to the NLRA or affects interests deeply rooted in local feeling and responsibility. *Belknap, Inc v Hale*, 463 US 491, 498; 103 S Ct 3172; 77 L Ed 2d 798 (1983). Here, the trial court properly concluded that it was unnecessary to engage in the balancing test because "the claims concern activities that are actually protected or prohibited by the NLRA."

We reject defendant's argument that his claims are "so deeply rooted in local feeling and responsibility" that they are actionable in state court. This exception to the *Garmon* preemption doctrine has been construed narrowly, in favor of the broad, exclusive jurisdiction of the NLRB. *Int'l Longshoremen's Ass'n v Davis*, 476 US 380, 391-393; 106 S Ct 1904; 90 L Ed 2d 389 (1986). Claims that have been held to fall within the exception involve state laws regulating violence, defamation, intentional infliction of emotional distress, trespassory picketing, and obstruction of access to property. *Sears, Roebuck & Co v San Diego Co Dist Council of Carpenters*, 436 US 180, 204, 207; 98 S Ct 1745; 56 L Ed 2d 209 (1978). Regardless of defendant's characterization of his claims, at their core they involve his participation in unionizing activities, the very subject matter of the NLRA.

Lastly, we find no merit to defendant's contention that his claim for discharge in violation of public policy is not preempted. In *Calabrese, supra*, the plaintiff alleged that she was wrongfully terminated because she would not fire employees for engaging in unionizing activities. She filed suit asserting claims for wrongful discharge and tortious interference with business relations. *Calabrese, supra* at 258-259. The plaintiff contended that she was terminated in violation of public policy. *Id*. at 259. This Court concluded that the plaintiff's claims constituted allegations of unfair labor practices under the NLRA and, thus, were preempted under the *Garmon* doctrine. *Id*. at 262-263. There are no distinguishing factors in this case that would compel a different result here. Accordingly, the trial court properly dismissed defendant's countercomplaint and third-party complaint for lack of subject-matter jurisdiction.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens